

E-Filed 2/6/09

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

HOWARD HERSHIPS,

Plaintiff,

v.

THE SUPERIOR COURT OF SANTA CLARA
COUNTY, et al.,

Defendants.

Case Number C 06-6644 JF (RS)

**ORDER¹ GRANTING MOTION TO
DISMISS**

RE: Docket Nos. 85, 90, 91

I. BACKGROUND

In this § 1983 action, Plaintiff Howard Herships (“Herships”) alleges that Defendant Steven T. Kirsch (“Kirsch”), a wealthy philanthropist, conspired with four Santa Clara County Deputy District Attorneys (collectively, “Defendants”) to violate Herships’ civil rights. Herships seeks monetary damages against Kirsch for his alleged role in initiating a baseless criminal action and soliciting false accusations against him. On October 25, 2005, Kirsch sued

¹ This disposition is not designated for publication in the official reports.

Hershops in the small claims division of the Santa Clara Superior Court for allegedly vandalizing Kirsch's automobile. On November 1, 2005, a criminal action based on the same facts was filed against Hershops in the Santa Clara Superior Court. Hershops alleges that the criminal action was brought without probable cause and was solely the result of a conspiracy designed by Kirsch to impair Hershops' ability to defend himself in the small claims action. Hershops seeks monetary damages for Kirsch's alleged role in initiating the purportedly baseless criminal action and soliciting false accusations against him in connection therewith.

Kirsch moves to dismiss the claims against him pursuant to Federal Rule of Civil Procedure 12(b)(6) and 28 U.S.C. § 1915(e)(2)(B), which governs actions instituted by a party proceeding *in forma pauperis*. Because of its relationship to the criminal proceeding, the instant action was stayed on August 16, 2007 pending termination of the criminal proceedings. On December 17, 2008, the jury in the criminal action returned a guilty verdict, which Hershops has appealed. Accordingly, Kirsch also now argues for dismissal under the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars civil rights actions in which a judgment for the plaintiff necessarily would impugn the validity of a criminal conviction that has not been reversed on appeal or otherwise called into question. *Id.* at 486-87.

II. LEGAL STANDARDS

A complaint may be dismissed for failure to state a claim upon which relief may be granted for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984). For purposes of a motion to dismiss, all allegations of material fact in the complaint are taken as true and construed in the light most favorable to the nonmoving party. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). A complaint should not be dismissed "unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Clegg*, 18 F.3d at 754. In addition, leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Dep't of Corrs.*, 66 F.3d 245, 248 (9th Cir. 1995). Conversely, dismissal may be ordered with prejudice when amendment would be futile. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th

1 Cir. 1996).

2 A district court is required to dismiss “at any time” an *in forma pauperis* complaint that is
 3 determined to be frivolous. 28 U.S.C. §1915(e)(2)(B). The court need not accept as true factual
 4 allegations in an *in forma pauperis* complaint. It may reject “completely baseless” allegations,
 5 including those which the court finds “fanciful,” “fantastic,” or “delusional.” *Denton v.*
 6 *Hernandez*, 504 U.S. 25, 32-33 (1992).

7 III. DISCUSSION

8 Kirsch argues that Herships’ action is barred in its entirety by the Supreme Court’s
 9 holding in *Heck v. Humphrey*, where the Court stated:

10 [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment,
 11 or for other harm caused by actions whose unlawfulness would render a conviction or
 12 sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been
 13 reversed on direct appeal, expunged by executive order, declared invalid by a state
 14 tribunal authorized to make such determination, or called into question by a federal
 15 court’s issuance of a writ of habeas corpus A claim for damages bearing that
 16 relationship to a conviction or sentence that has not been so invalidated is not cognizable
 17 under § 1983.

18 512 U.S. 477, 486-87 (1994). As the Ninth Circuit has explained, “if a criminal conviction
 19 arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior
 20 for which section 1983 damages are sought, the 1983 action must be dismissed.” *Smithart v.*
 21 *Towery*, 79 F.3d 951, 952 (9th Cir. 1996). “[T]he relevant question is whether success in a
 22 subsequent § 1983 suit would ‘necessarily imply’ or ‘demonstrate’ the invalidity of the earlier
 23 conviction or sentence.” *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (*en banc*).
 24 The Court therefore must determine whether proof of any of the collateral civil rights claims
 25 necessarily would contradict facts established by the prior conviction.

26 In the instant case, Herships alleges that he was the victim of a conspiracy by Kirsch, four
 27 prosecutors, and the judge in his criminal action. Herships claims that the criminal action was
 28 meritless and was initiated on the basis of perjured testimony and without probable cause.
 Herships also claims that the trial judge’s alleged bias constituted a deprivation of procedural
 due process. If proved, each of these allegations necessarily would imply the invalidity of
 Herships’ conviction in the Superior Court for vandalizing Kirsch’s car. *See Heck*, 512 U.S. at

486-87; *see also* *Trice v. Modesto City Police Dep't*, No. 1:08-cv-01891-AWI, 2009 WL 102712 (E.D. Cal. Jan. 14, 2009) (holding that claim of fraudulent or fabricated evidence, prosecutorial misconduct, or violations of plaintiff's right to counsel are barred by *Heck*); *Harris v. State of California*, Civ. No. 07-1406 BTM, 2008 WL 595880, at *2-4 (S.D. Cal. March 3, 2008) (holding that allegations of prosecutorial conduct, "clear misconduct" by the judge, and other "grave unfairness" in criminal proceedings were barred by *Heck*). Because Herships' conviction has not been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus, it must be dismissed. Accordingly, the Court will not reach Kirsch's other arguments for dismissal.

IV. DISPOSITION

Good cause therefore appearing, Kirsch's motion to dismiss will be granted. Dismissal will be without leave to amend but also "without prejudice so that [Herships] may reassert his claims if he ever succeeds in invalidating his conviction." *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995).

IT IS SO ORDERED.

DATED: 2/6/09


JEREMY FOCHEL
United States District Judge

1 This Order has been served upon the following persons:

2 Donald Alan Larkin Donald.Larkin@cityofpaloalto.org, Janet.Billups@cityofpaloalto.org

3 John Calvin Brown , III jbrown@redbrownlaw.com

4 John P. Devine john.devine@doj.ca.gov

5 Kevin Hammon kevin.hammon@cco.sccgov.org, cathy.grijalva@cco.sccgov.org

6 5:06-cv-6644 Notice has been delivered by other means to:

7 Howard Hershops
8 P.O. Box 190711
9 San Francisco, CA 94119-0711